

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WDNY/RONY
99-CR-6089
Siragusa

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of January, two thousand and four.

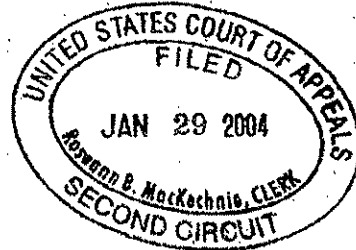
PRESENT:

HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges,

HON. EDWARD R. KORMAN,*

District Judge.



UNITED STATES OF AMERICA,

Appellee,

- v -

No. 01-1537, 02-1119.

WINSTON BANNER, also known as Conroy
Porchman, also known as Cisco, DAMON
SHALLOW, also known as Romello,

Defendants,

KEVIN PIERRE, also known as Jimmy Grant,
also known as P.B., DENNIS FORBES,

Defendants-Appellants.

* Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Defendants-Appellants.

Appearing for Appellants: M. KIRK OKAY, The Okay Law Firm,
Batavia, NY, for Defendant-
Appellant Forbes,

JAMES J. RIZZO, Rochester, NY, for
Defendant-Appellant Pierre.

Appearing for Appellee: FRANK H. SHERMAN, Assistant United
States Attorney for the Western
District of New York (Michael A.
Battle, United States Attorney, of
counsel), Rochester, NY.

Appeal from the United States District Court for the Western
District of New York (Charles J. Siragusa, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND
DECREEED that the judgment of district court be, and it hereby is,
AFFIRMED.

Defendants-appellants Kevin Pierre and Dennis Forbes appeal
from a judgment of conviction dated October 15, 2001. Pierre
also appeals from an amended judgment of conviction dated
October 30, 2001, and Forbes from a judgment of conviction dated
January 29, 2002. Both were convicted under 21 U.S.C. §§
841(a)(1) and 841(b)(1)(A) of conspiracy to possess with intent
to distribute 50 grams or more of cocaine base and marijuana.
Pierre was also convicted of violating 18 U.S.C. § 924(c)(1) for
using or carrying a firearm during or in relation to a drug
trafficking crime or possessing a firearm in furtherance of a
drug trafficking crime. Forbes was also convicted under 21
U.S.C. § 861(a)(1) for, inter alia, employing co-defendant
Winston Banner, who was then under 18 years of age, to violate 18
U.S.C. § 841.

On appeal, Pierre challenges his section 924(c) conviction
and an evidentiary ruling and advances a retroactive misjoinder
argument. Forbes argues that Rochester police officers took a
statement from him in violation of Miranda v. Arizona, 384 U.S.
436 (1966), disputes several evidentiary rulings, and challenges
two of the district court's sentencing decisions. We dispose of
Forbes's Miranda argument in an opinion also filed today. The
remainder of defendants' arguments we consider in this summary
order.

1 Pierre's Conviction Under 18 U.S.C. § 924(c)(1)

2 Although conceding that the district court's jury
 3 instructions with respect to charges against him under 18 U.S.C.
 4 § 924(c)(1) were proper, Pierre contends that there was
 5 insufficient evidence to support his conviction thereunder.
 6 While mere possession of a firearm by a defendant at the time he
 7 or she is engaged in a drug trafficking crime is not alone enough
 8 to support a section 924(c) conviction, the testimony in this
 9 case would permit a rational finder of fact to conclude that
 10 Pierre used a gun during or in connection with the drug
 11 trafficking crime of which he was convicted or possessed a gun
 12 "in furtherance of" the crime. According to evidence elicited by
 13 the government, the firearm in question was found in a building
 14 where Pierre and others sold drugs, under debris on a ledge
 15 underneath the stairwell and just outside the basement door near
 16 where drugs were sold. The revolver was fully loaded, Pierre's
 17 fingerprints were on the gun, and the gun was stolen. Government
 18 witness Terrence Melford testified that he had previously seen
 19 Pierre holding the gun while drugs were being sold. This
 20 combination of facts was sufficient in these circumstances for
 21 conviction.

22 Retroactive Misjoinder

23 Pierre argues that his trial was improperly joined with
 24 Forbes's because the jury was exposed to evidence against Forbes
 25 on a section 924(c) charge on which the jury ultimately failed to
 26 reach a verdict. Specifically, Pierre asserts that he is
 27 entitled to a new trial because he was "severely prejudiced" by
 28 testimony of Forbes's involvement in a gruesome gunfight. Pierre
 29 Br. 23-25. He is not. We find no persuasive evidence in the
 30 record of prejudicial "spillover" in this case. See United
 31 States v. Hamilton, 334 F.3d 170, 183 (2d Cir. 2003).

32 The Evidentiary Rulings

33 Forbes argues that the district court erred by admitting
 34 testimony about Forbes's involvement in a 1998 gunfight. The
 35 district court found that Forbes's attorney had "opened the door"
 36 to this testimony by eliciting testimony from a Rochester police
 37 officer regarding his questioning of Forbes during Forbes's
 38 hospital stay following the gunfight. In light of the fact that
 39 the challenged testimony was elicited on redirect examination,
 40 and because determinations of the scope of redirect are
 41 "entrusted to a trial judge's broad discretion," United States v.
 42 Vasquez, 267 F.3d 79, 85 (2d Cir. 2001), we will not disturb the
 43 district court's ruling. We also conclude that Forbes's

1 contention that counsel's representation in this regard
2 constituted ineffective assistance of counsel is unpersuasive
3 because it appears to have been part of a reasonable trial
4 strategy. See United States v. Best, 219 F.3d 192, 201 (2d Cir.
5 2000).

6 Forbes also contends that the district court erred by
7 admitting Melford's testimony regarding statements made to him by
8 Pierre in 1998. It was within the district judge's discretion to
9 admit the statements under Fed. R. Evid. 801(d)(2)(E). Even if
10 there was no foundation regarding the conspiracy when the
11 evidence was admitted, this Circuit permits conditional admission
12 of co-conspirator statements under United States v. Geaney, 417
13 F.2d 1116, 1120 (2d Cir. 1969), and its progeny. Forbes does not
14 suggest that there was no evidence of a conspiracy by the end of
15 the trial and the evidence was therefore properly admitted
16 conditionally subject to the admission of the evidence of the
17 conspiracy.

18 Forbes challenges the district court's admission of
19 testimony concerning Forbes's prior felony conviction. He made
20 no such objection at trial. We conclude that the admission of
21 testimony regarding Forbes's prior felony conviction, whether or
22 not "error" or "plain," did not seriously affect the fairness or
23 integrity of the trial, or the public reputation of the
24 proceedings, and therefore does not warrant application of Rule
25 52(b)'s exception to the general "raise or waive" rule. United
26 States v. Olano, 507 U.S. 725, 732 (1993).

27 Finally, both Forbes and Pierre challenge the district
28 court's invocation of Fed. R. Evid. 608(b) to disallow cross-
29 examination of Melford regarding a pending robbery charge. The
30 scope and extent of cross-examination are entrusted to the
31 district court's "wide discretion." United States v. Flaharty,
32 295 F.3d 182, 190 (2d Cir. 2002). We see no abuse of discretion
33 in the court's ruling.

34 Sentencing Rulings

35 Forbes argues that the district court erred when it found
36 that he was an "organizer" or "leader" of a criminal activity
37 under USSG § 3B1.1. However, this classification is reviewed
38 only for clear error. United States v. Rodriguez-Gonzalez, 899
39 F.2d 177, 183 (2d Cir. 1990). We see no clear error in the
40 district court's deeming Forbes an organizer instead of a manager
41 under the multifactor test specified by USSG § 3B1.1 cmt. 4.

1 Forbes also disputes the district court's methodology in
2 approximating the amount of cocaine base with which he was
3 involved for purposes of USSG § 2D1.1(c). However, the
4 Sentencing Guidelines permit such approximation, USSG § 2D1.1
5 cmt. 12, and we have previously upheld similar drug quantity
6 estimation techniques, United States v. Moreno, 181 F.3d 206,
7 213-14 (2d Cir. 1999).

8 For the foregoing reasons (as well as those stated in our
9 accompanying opinion), the judgment of the district court is
10 hereby AFFIRMED.

11 FOR THE COURT:
12 Roseann B. MacKechnie, Clerk

13 By: Richard Alcantara
14 Richard Alcantara, Deputy Clerk

1/29/2004
Date